

**REDACTED DECISION – DK# 10-435 C – BY - A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION on JULY 18, 2011, ISSUED ON DECEMBER 8, 2011**

## **FINAL DECISION**

### **SYNOPSIS**

**WEST VIRGINIA OFFICE OF TAX APPEALS** – In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment the burden of proof is upon the petitioner to show that any assessment of tax or penalty is erroneous, unlawful, void or otherwise invalid. *See generally* W. Va. Code § 11-10A-10(e) and W. Va. Code St. R. § 121-1-63.1.

**CONSUMERS SALES AND SERVICE TAX** – “For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the commissioner in accordance with the provisions of this article.” West Virginia Code § 11-15-3(a).

**CONSUMERS SALES AND SERVICE TAX** – “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” West Virginia Code § 11-15-4.

**CONSUMERS SALES AND SERVICE TAX** – “Each vendor shall collect from the purchaser the consumer sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code St. R. § 110-15-4.1.

**CONSUMERS SALES AND SERVICE TAX** – “If the tax commissioner believes that any tax . . . has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability and make an assessment therefor.” West Virginia Code § 11-10-7.

**CONSUMERS SALES AND SERVICE TAX** – The Commissioner may add interest and additions to tax where applicable. *See* West Virginia Code §§ 11-10-17, et seq. and 11-10-18, et seq.

**CONSUMERS SALES AND SERVICE TAX** – “Separately stated delivery charges are subject to the consumers sales and service tax, unless the delivery service is provided by a common carrier subject to regulation by the Public Service Commission and the customer pays the delivery charge directly to the common carrier.” W. Va. Code St. R. § 110-15-89.

**CONSUMERS SALES AND SERVICE TAX** – “the applicability of the sales and use tax depends on the classification of the business purchasing the property or service and the use of the property or service being purchased rather than the type of property or service purchased. The same purchase of the same item may be taxable in one instance and exempt in another, depending totally on its purchaser and usage.” W. Va. Code St. R. § 110-15-123.1.

**CONSUMERS SALES AND SERVICE TAX** – “Persons who are engaged in the business of manufacturing, transportation, transmission, communication, or production of natural resources who purchase property or services for use in that business activity are subject to the direct use concept.” W. Va. Code St. R. § 110-15-123.2.

**CONSUMERS SALES AND SERVICE TAX** – “General guidelines for determining whether property or services are directly or indirectly used in an activity, thereby making the purchase taxable or exempt, are outlined in Sections 123.3.1 and 123.3.2 of these regulations. More specific examples are listed by industry in Section 123.4 of these regulations.” W. Va. Code St. R. § 110-15-123.3.

**CONSUMERS SALES AND SERVICE TAX** – “It is the intent of this article that the tax levied hereunder shall be passed on to and paid by the ultimate consumer. The amount of tax shall be added to the sales price, and shall constitute a part of that price and be collectible as such.” West Virginia Code § 11-15-10.

## **FINDINGS OF FACT**

1. Petitioner operates Company A, a sole proprietorship conducting business in the state of West Virginia.
2. Petitioner’s business consists of picking up movies outside of West Virginia and delivering them to movie theaters in certain places in West Virginia.
3. When there is a new release, one of the movie theaters with whom Petitioner conducts business will hire him to pick up the film outside of West Virginia.
4. Petitioner will travel out of state, obtain the film, and drive it back to West Virginia, delivering it to the theater that contracted to use his services.

5. The next time the same theater hires Petitioner to pick up a new film in the out of state area, he returns the previous film and picks up the new one.

6. Petitioner invoices the theater for his services, but does not add sales tax to his invoices. As such, Petitioner does not charge, collect, or remit sales tax on the services that he provides to various theaters.

7. The businesses that the Petitioner deals with at all times are the movie theaters for whom he provides delivery services.

8. Petitioner does not purchase the films and resell them to the theaters that hire him. His services are limited to picking up movies, delivering them, and returning them.

9. Petitioner was audited sometime around September 2010 by the West Virginia State Tax Department (hereinafter the Respondent).

10. The auditors met with Petitioner and inquired about his business. When asked how many theaters he delivered for, he responded that he delivered only for one theater in West Virginia and a couple of times for a drive-in theater in West Virginia.

11. The auditors knew that this response was not candid because at that time they already had proof that he was delivering for at least one other theater in West Virginia.

12. The auditors surveyed a number of other movie theaters in Petitioner's geographical region in an effort to ascertain whether Petitioner was delivering films for them as well. Some of the theaters responded in the affirmative, some reported that petitioner was not their delivery person, and some did not respond to the auditors' phone calls.

13. The auditors concluded their investigation of Petitioner's business and issued two assessments. The first was a sales tax assessment issued against Company A in the amount of \$\_\_\_\_, plus \$\_\_\_\_ in interest and \$\_\_\_\_ in additions, for a total assessed amount of \$\_\_\_\_,

covering tax periods January 1, 2005, through June 30, 2008. The second was a combined sales and use tax assessment issued against Petitioner personally, in the amount of \$\_\_\_\_, plus \$\_\_\_\_ in interest and \$\_\_\_\_ in additions, for a total assessed amount of \$\_\_\_\_, covering tax periods July 1, 2008, through September 30, 2010.

### **PROCEDURAL HISTORY**

Upon receipt of both assessments Petitioner made timely appeal to the West Virginia Office of Tax Appeals, where the matter was assigned to the undersigned Administrative Law Judge, Christopher B. Amos. An evidentiary hearing was conducted in Clarksburg, West Virginia. Petitioner appeared in person and by his representative, Enrolled Agent. Respondent appeared by Mr. Mike V. Marlow, Esq., Staff Attorney. Present also for the Respondent was Ms. Evelyn Furbee, Audit Supervisor. Following the evidentiary hearing the record was closed and the matter became mature for decision at that time.

### **ISSUES AND BURDEN OF PROOF**

The question presented in this case is whether the Petitioner, individually and as sole proprietor of Company A, is responsible for sales tax and combined sales and use tax as assessed. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment the burden of proof is upon the petitioner to show that any assessment of tax or penalty is erroneous, unlawful, void or otherwise invalid. *See generally* W. Va. Code § 11-10A-10(e) and W. Va. Code St. R. § 121-1-63.1.

### **DISCUSSION**

West Virginia Code § 11-15-3(a) makes clear that “For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the

commissioner in accordance with the provisions of this article.”<sup>1</sup> Further, West Virginia Code § 11-15-4 states that “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.”

According to W. Va. Code St. R. § 110-15-4.1, “Each vendor shall collect from the purchaser the consumer sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price.” Also, “If the tax commissioner believes that any tax . . . has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability and make an assessment therefor.” West Virginia Code § 11-10-7. Finally, the Commissioner may add interest and additions to tax where applicable. *See* West Virginia Code §§ 11-10-17, et seq. and 11-10-18, et seq.

The Petitioner was audited sometime in or around September 2010. When asked by the auditor for how many theaters he delivered movies, Petitioner responded that he delivered only for one theater in West Virginia, and had on just a couple of occasions delivered movies to a drive-in theater in West Virginia. The auditors however knew that this statement was not truthful because they already had evidence that Petitioner was delivering movies for another cinema in West Virginia.<sup>2</sup> Additionally, the auditors had a signed statement from the Petitioner

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<sup>1</sup> Vendor means “any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property.” *See* West Virginia Code § 11-15-2(z). The amount of consumers sales and service tax is “six cents on the dollar of sales or services, excluding gasoline and special fuels, which remain taxable at the rate of five cents on the dollar of sales.” West Virginia Code § 11-15-3(b).

<sup>2</sup> *See* Respondent’s Exhibit 2 (various invoices submitted by Petitioner to a theater in West Virginia).

in which he represented to a theater that all of his invoices to them included sales tax and that he remitted all sales tax to the West Virginia State Tax Department.<sup>3</sup>

This information prompted the auditors to investigate whether Petitioner was delivering movies to other cinemas that he was not telling them about. The auditors contacted a number of different movie theaters in Petitioner's geographical region and asked them who delivered their movies. Some of the theaters reported that Petitioner did indeed deliver for them, some reported that their movies were delivered by someone other than the Petitioner, and a couple of theaters did not respond to the auditors' phone calls. From this information the auditors were able to conclude that the Petitioner was in fact delivering movies to more theaters than he had previously admitted. The auditors did not associate Petitioner with those theaters that expressly reported that Petitioner was not their delivery person; however they did conclude that the Petitioner probably delivered movies as well to the theaters that did not respond to their phone calls.

In all, Respondent associated the Petitioner with 8 movie theaters in his region.<sup>4</sup> The auditors calculated the weekly sales made to one of Petitioner's known customers, and from that they computed estimated sales to all 8 theaters that they had associated with the Petitioner. From that figure the auditors then calculated an annual sales tax amount and applied that figure to each year of the auditing period. The end result was an estimated sales tax of \$\_\_\_\_\_ per year for tax periods 2005 through 2009, and January 1, 2010, through September 30, 2010, which produced a total estimated tax of \$\_\_\_\_\_.<sup>5</sup> Ms. Furbee testified that at the exit interview Petitioner was given another opportunity to disclose all of his customers, but that he refused to provide any additional information. Thus, assessments were issued based upon these calculations.

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<sup>3</sup> *Id.* See also Respondent's Exhibit 6.

<sup>4</sup> These theaters include eight (8) in West Virginia. See Respondent's Exhibits 4 and 7.

<sup>5</sup> See Respondent's Exhibit 4. This aggregate amount does not reflect interest and additions.

Petitioner operates a delivery service. W. Va. Code St. R. § 110-15-89 provides that “Separately stated delivery charges are subject to the consumers sales and service tax, unless the delivery service is provided by a common carrier subject to regulation by the Public Service Commission and the customer pays the delivery charge directly to the common carrier.” Because Petitioner is not a common carrier subject to regulation by the Public Service Commission, he must charge consumers sales and service tax for his services unless he can demonstrate why his services are not otherwise taxable.

Petitioner argued first that prior to the audit he had contacted someone at the Tax Department in Charleston, West Virginia, who purportedly told him that he did not need to charge sales tax for his services and to enter only zeros on his sales tax returns. However, Petitioner was unable to identify the person with whom he spoke that allegedly made these representations. Nor did Petitioner subpoena this or any other person to testify at the evidentiary hearing regarding these supposed representations. As such, the undersigned, as trier of fact, must conclude that little probative weight can be assigned to these statements.<sup>6</sup>

Petitioner argued next that the figures calculated by the Respondent grossly overestimate the amount of his actual sales, because he does not deliver for all 8 of the cinemas as Respondent alleges. Petitioner introduced a couple of documents which purportedly show that his income from three (3) theaters in West Virginia, for years 2005 through 2010, actually totals \$\_\_\_\_.<sup>7</sup> However, when asked at the evidentiary hearing, Petitioner admitted that he told the auditor that he delivered only for the one theater in West Virginia, and only a couple of times for a drive-in theater in West Virginia.

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<sup>6</sup> Additionally, this statement is contradictory to the document that Petitioner supplied to a Cinema in West Virginia in which he represented to that theater that his invoices contain sales tax charges and that he remits sales tax to the State of West Virginia. Petitioner’s Exhibits 2 and 6.

<sup>7</sup> See Petitioner’s Exhibits 3 and 5.

At the hearing Petitioner testified that he actually has 3 customers, but not 8. This presents an obvious credibility issue. While it is possible that Petitioner may not deliver for all 8 movie theaters as alleged, his inconsistent statements about delivering for even more than just one theater calls into question the veracity of these statements. Based upon Petitioner's conflicting statements, the undersigned must conclude that his representations about only having three customers are not convincing.

Petitioner argued also that his services are tax exempt because of the direct use concept. Under the direct use concept:

the applicability of the sales and use tax depends on the classification of the business purchasing the property or service and the use of the property or service being purchased rather than the type of property or service purchased. The same purchase of the same item may be taxable in one instance and exempt in another, depending totally on its purchaser and usage.

W. Va. Code St. R. § 110-15-123.1.

“Persons who are engaged in the business of manufacturing, transportation, transmission, communication, or production of natural resources who purchase property or services for use in that business activity are subject to the direct use concept.” W. Va. Code St. R. § 110-15-123.2. Also, “General guidelines for determining whether property or services are directly or indirectly used in an activity, thereby making the purchase taxable or exempt, are outlined in Sections 123.3.1 and 123.3.2 of these regulations. More specific examples are listed by industry in Section 123.4 of these regulations.” W. Va. Code St. R. § 110-15-123.3. The problem for Petitioner is that the movie theaters who are purchasing his delivery services are not engaged in the business of manufacturing, transportation, transmission, communication, or the production of



natural resources. Nor do they resemble any of the examples set forth in W. Va. Code St. R. § 110-15-123.3.1-2 or W. Va. Code St. R. § 110-15-123.4.<sup>8</sup>

Finally, the Petitioner argued that his services are not taxable because sales tax is to be passed on to the ultimate consumer, and in this case the ultimate consumer of the movies being delivered are the movie theater patrons who presumably pay tax on the purchase of tickets to see the films that the Petitioner delivers. Indeed, the consumers sales and service tax statute provides in relevant part that, “It is the intent of this article that the tax levied hereunder shall be passed on to and paid by the ultimate consumer. The amount of tax shall be added to the sales price, and shall constitute a part of that price and be collectible as such.” West Virginia Code § 11-15-10.

The reference to this provision of the Code is not persuasive for the reason that the movie theater is the ultimate consumer of Petitioner’s delivery services, and not the movie patrons who purchase a theater ticket. To accept Petitioner’s argument is to further accept the idea that all delivery services provided to a company is ultimately passed on the purchasers of that company’s final goods or services. That is a conclusion that does not stand to reason, especially since, as stated *supra*, W. Va. Code St. R. § 110-15-89 specially provides that separately stated delivery charges are subject to the consumers sales and service tax.

For the foregoing reasons it must be held that the Petitioner did not meet his burden of proof and establish that the assessments of sales tax and sales and use tax at issue in this case were erroneous, unlawful, void or otherwise invalid. *See generally* W. Va. Code § 11-10A-10(e) and W. Va. Code St. R. § 121-1-63.1.

## **CONCLUSIONS OF LAW**

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<sup>8</sup> The examples set forth in these sections of the regulations are too voluminous to reprint here.

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment the burden of proof is upon the petitioner to show that any assessment of tax or penalty is erroneous, unlawful, void or otherwise invalid. *See generally* W. Va. Code § 11-10A-10(e) and W. Va. Code St. R. § 121-1-63.1.

2. “For the privilege of selling tangible personal property and of dispensing certain select services . . . the vendor shall collect from the purchaser the tax as provided under this article, and shall pay the amount of tax to the commissioner in accordance with the provisions of this article.” West Virginia Code § 11-15-3(a).

3. “The purchaser shall pay to the vendor the amount of tax levied by this article which shall be added to and constitute a part of the sales price, and shall be collectible as such by the vendor who shall account to the State for all tax paid by the purchaser.” West Virginia Code § 11-15-4.

4. “Each vendor shall collect from the purchaser the consumer sales and service tax levied and imposed upon each sale of tangible personal property and service in West Virginia before or at the time such tax accrues. Such tax shall be added to and constitute a part of the sales price.” W. Va. Code St. R. § 110-15-4.1.

5. “If the tax commissioner believes that any tax . . . has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability and make an assessment therefor.” West Virginia Code § 11-10-7.

6. The Commissioner may add interest and additions to tax where applicable. *See* West Virginia Code §§ 11-10-17, et seq. and 11-10-18, et seq.

7. “Separately stated delivery charges are subject to the consumers sales and service tax, unless the delivery service is provided by a common carrier subject to regulation by the Public Service Commission and the customer pays the delivery charge directly to the common carrier.” W. Va. Code St. R. § 110-15-89.

8. “the applicability of the sales and use tax depends on the classification of the business purchasing the property or service and the use of the property or service being purchased rather than the type of property or service purchased. The same purchase of the same item may be taxable in one instance and exempt in another, depending totally on its purchaser and usage.” W. Va. Code St. R. § 110-15-123.1.

9. “Persons who are engaged in the business of manufacturing, transportation, transmission, communication, or production of natural resources who purchase property or services for use in that business activity are subject to the direct use concept.” W. Va. Code St. R. § 110-15-123.2.

10. “General guidelines for determining whether property or services are directly or indirectly used in an activity, thereby making the purchase taxable or exempt, are outlined in Sections 123.3.1 and 123.3.2 of these regulations. More specific examples are listed by industry in Section 123.4 of these regulations.” W. Va. Code St. R. § 110-15-123.3.

11. Petitioner did not establish that his delivery services are exempt from West Virginia Consumer Sales and Service Tax under the direct use concept.

12. “It is the intent of this article that the tax levied hereunder shall be passed on to and paid by the ultimate consumer. The amount of tax shall be added to the sales price, and shall constitute a part of that price and be collectible as such.” West Virginia Code § 11-15-10.

13. Petitioner did not establish that his delivery services are exempt from West Virginia Consumer Sales and Service Tax because those services are passed on to the patrons who purchase tickets from the theaters to whom he delivers movies.

14. The Petitioner did not meet his burden of proof and establish that the assessments of sales tax and sales and use tax at issue in this case were erroneous, unlawful, void or otherwise invalid. *See generally* W. Va. Code § 11-10A-10(e) and W. Va. Code St. R. § 121-1-63.1.

### **DISPOSITION**

**WHEREFORE**, it is the final decision of the West Virginia Office of Tax Appeals that the sales tax assessment issued against Corporation A, in the amount of \$\_\_\_\_, plus \$\_\_\_\_ in interest and \$\_\_\_\_ in additions, for a total assessed amount of \$\_\_\_\_, covering tax periods January 1, 2005, through June 30, 2008, should be and hereby is **AFFIRMED**.

It is further held that the combined sales and use tax assessment issued against Petitioner personally, in the amount of \$\_\_\_\_, plus \$\_\_\_\_ in interest and \$\_\_\_\_ in additions, for a total assessed amount of \$\_\_\_\_, covering tax periods July 1, 2008, through September 30, 2010, should be and hereby is **AFFIRMED**.